

U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

File: WAC-01-218-54865 Office: California Service Center

Date: MAR 10 2003

IN RE: Petitioner:

Petition: Immigrant Petition by Alien Entrepreneur Pursuant to Section 203(b)(5) of the Immigration and Nationality Act,
8 U.S.C. § 1153(b)(5)

ON BEHALF OF PETITIONER:

PUBLIC COPY

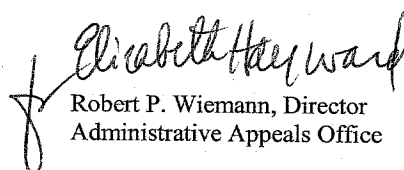
INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification as an alien entrepreneur pursuant to section 203(b)(5) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(5).

The director determined that the petitioner had failed to demonstrate the lawful source of his "invested" funds.

On appeal, counsel asserts for the first time that the petitioner's "investment" derives from the new commercial enterprise itself, via an affiliated company allegedly owned by the petitioner and his brother.

The 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002), which amends portions of the statutory framework of the EB-5 Alien Entrepreneur program, was signed into law on November 2, 2002. Section 11036(a)(1)(B) of this law eliminates the requirement that the alien personally establish the new commercial enterprise. Section 11036(c) provides that the amendment shall apply to aliens having a pending petition. As the petitioner's appeal was pending on November 2, 2002, he need not demonstrate that he personally established a new commercial enterprise. The issue of whether the petitioner purchased a preexisting business is still relevant, however, as a petitioner must still demonstrate the creation of 10 new jobs. Furthermore, Congress did not remove the statutory reference to "new." Thus, the petitioner must demonstrate an investment in a commercial enterprise established by himself or someone else after November 29, 1990.

Section 203(b)(5)(A) of the Act, as amended, provides classification to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise:

- (i) in which such alien has invested (after the date of the enactment of the Immigration Act of 1990) or, is actively in the process of investing, capital in an amount not less than the amount specified in subparagraph (C), and
- (ii) which will benefit the United States economy and create full-time employment for not fewer than 10 United States citizens or aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States (other than the immigrant and the immigrant's spouse, sons, or daughters).

The petition is based on an alleged investment in [REDACTED] of which the petitioner is allegedly a 50 percent owner.

SOURCE OF FUNDS

8 C.F.R. § 204.6(j) states, in pertinent part, that:

(3) To show that the petitioner has invested, or is actively in the process of investing, capital obtained through lawful means, the petition must be accompanied, as applicable, by:

(i) Foreign business registration records;

(ii) Corporate, partnership (or any other entity in any form which has filed in any country or subdivision thereof any return described in this subpart), and personal tax returns including income, franchise, property (whether real, personal, or intangible), or any other tax returns of any kind filed within five years, with any taxing jurisdiction in or outside the United States by or on behalf of the petitioner;

(iii) Evidence identifying any other source(s) of capital; or

(iv) Certified copies of any judgments or evidence of all pending governmental civil or criminal actions, governmental administrative proceedings, and any private civil actions (pending or otherwise) involving monetary judgments against the petitioner from any court in or outside the United States within the past fifteen years.

A petitioner cannot establish the lawful source of funds merely by submitting bank letters or statements documenting the deposit of funds. *Matter of Ho*, 22 I&N Dec. 201, 210-211 (Comm. 1998); *Matter of Izummi*, 22 I&N Dec. 169, 195 (Comm. 1998). Without documentation of the path of the funds, the petitioner cannot meet his burden of establishing that the funds are his own funds. *Id.* Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). An unsupported letter indicating the number and value of shares of capital stock held by the petitioner in a foreign business is also insufficient documentation of source of funds. *Matter of Ho, supra*, at 211. These “hypertechnical” requirements serve a valid government interest: confirming that the funds utilized are not of suspect origin. *Spencer Enterprises, Inc. v. United States*, CIV-F-99-6117, 22 (E.D. Calif. 2001)(affirming a finding that a petitioner had failed to establish the lawful source of her funds due to her failure to designate the nature of all of her employment or submit five years of tax returns).

Initially, counsel asserted that the petitioner had invested “personal family funds and savings in Amman, Jordan.” The petitioner submitted a receipt on Standard and Chartered Grindlays letterhead for the debit of \$500,000 as “payment by [the petitioner].” The beneficiary is listed as [REDACTED] The petitioner also submitted a Standard and Chartered Grindlays security check dated April 10, 2001 reflecting that the petitioner remitted the check to Bright

International for \$500,000 and a deposit slip dated April 17, 2001. On April 29, 2002, the director requested additional evidence of the petitioner's source of funds, advising the petitioner of the above regulations. In response, counsel asserted:

The money that was sent is family money. [The petitioner's] father is a wealthy business owner in Jordan. He owns the distribution company for all General Electric products in the country. This was money given to his son, and the money was in a bank whose headquarters are registered in Sydney, Australia, and has a branch in Jordan.

The petitioner did not submit any documentation to support the above claims. Thus, the director concluded that the petitioner had not established the lawful source of his funds.

On appeal, counsel asserts:

[The petitioner] has been actively involved with the business as a partner with his brother. Money earned by this business has been invested in a land development business. The profits were then sent to a bank in Jordan. The investment made by [the petitioner] was directly earned by his work in the business.

The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Thus, we must determine whether the new evidence submitted on appeal supports counsel's assertions and, if it does, whether this reinvestment of corporate proceeds constitutes a personal investment by the petitioner.

The petitioner submits [REDACTED] returns for 1993 through 2001 as evidence of Bright International's gross receipts of \$7,696,100 during that period. The petitioner also submits a March 20, 2001 receipt allegedly for the transfer of \$713,851.84 from [REDACTED] East West Investment, the land development business. While the receipt documents the deposit, it does not establish the source of the funds deposited. We note that the March 2001 bank statement for [REDACTED] submitted initially does not reflect a withdrawal of this amount.

The petitioner further submitted East West Investment's tax returns for 1998 through 2001 as evidence of its gross income of \$825,111 during that time. In addition, the petitioner submits a wire transfer advice for \$500,000 from East West Investment to Maen Bibars' account at Standard Chartered Grindlays. Counsel asserts that this account is a "family account." Finally, the petitioner resubmits the debit receipt, security check, and deposit slip submitted initially.

Counsel fails to explain the withdrawal of funds from [REDACTED] that allegedly is the ultimate source of the petitioner's alleged investment back into [REDACTED]. If the petitioner earned income from Bright International or received a dividend from [REDACTED], [REDACTED] paid taxes on that money, invested it into the land investment company, withdrew it from the land development company and then reinvested it [REDACTED] the

petitioner might be able to demonstrate a qualifying investment of lawfully obtained funds. But the record is inconsistent and fails to support that scenario. The petitioner did not submit a Form W-2 or Form 1099-DIV reflecting that he received income from [REDACTED] to his alleged investment in 2001. The instructions to Form 1120, Schedule M-2, provide that line five on this schedule should include "all distributions to shareholders charged to retained earnings during the tax year." On all [REDACTED] tax returns, line five on Schedule M-2 is blank. The record includes no evidence of distributions not charged to retained earnings. Thus, the petitioner has not established that the money withdrawn from [REDACTED] in East West Investment, and returned [REDACTED] a bank account in Jordan constitutes the petitioner's personal funds.

In addition [REDACTED] returns reflect significant "other assets" on its tax returns. A review of the statements breaking down these assets reflects that they include "investment in land." If [REDACTED] corporation and a separate legal entity, briefly invested some of its proceeds that it, after only one month, routed through a "family" account in Jordan without the petitioner ever paying taxes on those funds, we cannot consider those funds the petitioner's personal investment.

Moreover, the petitioner did not provide evidence from Standard Chartered Grindlays reflecting that he is one of the account holders of the "family" account through which the funds were transferred. Similarly, the tax returns for East West Investment do not reflect who owns the majority of the shares in that corporation.

Finally, the petitioner continues to rely on an alternate explanation for the funds on appeal. The petitioner submitted an unsigned letter purportedly from his father, [REDACTED], asserts that because the petitioner had always been active [REDACTED] "gave him 50% shares [REDACTED] and a lump sum gift of \$500,000 to invest in the company." This explanation is somewhat consistent with the original documentation, which included a stock ledger reflecting that [REDACTED] transferred 5,000 of his 5,100 shares to the petitioner. The reference letters confirming that [REDACTED] is a businessman in Jordan, however, are inadequate to establish that he lawfully accumulated the amount of funds allegedly gifted to his son. Regardless, the corporate tax returns submitted on appeal are inconsistent with the original claims and documentation submitted. All of the corporate tax returns, including the 2001 return, reflect that [REDACTED] 100 percent [REDACTED]. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

In light of the above, the documentation submitted on appeal is inconsistent with the claims and documentation submitted initially. The petitioner has not resolved these inconsistencies. In addition, the explanation provided on appeal is not indicative of a personal investment by the petitioner of lawfully obtained funds. Moreover, as will be discussed below, the tax returns submitted on appeal raise new concerns regarding the existence of a \$500,000 investment in [REDACTED] by anyone.

INVESTMENT OF CAPITAL

8 C.F.R. § 204.6(e) states, in pertinent part, that:

Capital means cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness secured by assets owned by the alien entrepreneur, provided the alien entrepreneur is personally and primarily liable and that the assets of the new commercial enterprise upon which the petition is based are not used to secure any of the indebtedness.

* * *

Invest means to contribute capital. A contribution of capital in exchange for a note, bond, convertible debt, obligation, or any other debt arrangement between the alien entrepreneur and the new commercial enterprise does not constitute a contribution of capital for the purposes of this part.

8 C.F.R. § 204.6(j) states, in pertinent part, that:

(2) To show that the petitioner has invested or is actively in the process of investing the required amount of capital, the petition must be accompanied by evidence that the petitioner has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk. Evidence of mere intent to invest, or of prospective investment arrangements entailing no present commitment, will not suffice to show that the petitioner is actively in the process of investing. The alien must show actual commitment of the required amount of capital. Such evidence may include, but need not be limited to:

(i) Bank statement(s) showing amount(s) deposited in United States business account(s) for the enterprise;

(ii) Evidence of assets which have been purchased for use in the United States enterprise, including invoices, sales receipts, and purchase contracts containing sufficient information to identify such assets, their purchase costs, date of purchase, and purchasing entity;

(iii) Evidence of property transferred from abroad for use in the United States enterprise, including United States Customs Service commercial entry documents, bills of lading and transit insurance policies containing ownership information and sufficient information to identify the property and to indicate the fair market value of such property;

(iv) Evidence of monies transferred or committed to be transferred to the new commercial enterprise in exchange for shares of stock (voting or nonvoting, common or preferred). Such stock may not include terms requiring the new commercial enterprise to redeem it at the holder's request; or

(v) Evidence of any loan or mortgage agreement, promissory note, security agreement, or other evidence of borrowing which is secured by assets of the petitioner, other than those of the new commercial enterprise, and for which the petitioner is personally and primarily liable.

As stated above, the petitioner initially submitted evidence that he had acquired 5,000 shares of stock in [REDACTED]. Curiously, while the "past performance" balance sheets in the July 15, 2002 business plan reflects \$500,000 in "paid in capital" in 2001, that amount decreases to \$0 in 2002. A balance sheet shows a company's financial position at the end of an accounting period. *See Barron's Dictionary of Accounting Terms* 41 (3d ed. 2000). It is not a statement of cash flows, which reflects transactions during a defined period. *See id.* at 414. Thus, the 2002 balance sheet reflects that any paid in capital from 2001 was removed prior to July 15, 2002. As a petitioner must sustain his investment until his conditions are removed, the apparent removal of the entire claimed \$500,000 by July 15, 2002 is troubling.

Moreover, while not addressed by the director, the purchase of stock from an existing shareholder does not increase the total capital invested in a corporation. As such, the assertion that the petitioner funded the construction of a new facility is not supported by the initial documentation. Regardless, the tax returns submitted on appeal conflict with the balance sheets submitted as part of the business plan. For example, the tax returns for 2000 and 2001 reflect assets of \$1,738,443 and \$2,363,243 while the balance sheets for the same years reveal assets of \$1,483,182 and \$1,963,961. Most significantly, the tax returns reveal [REDACTED] does not have and has never had \$500,000 in capital. Specifically, every schedule L of each tax return from 1993 to 2001, the year in which the petitioner allegedly made his investment, reflects only \$10,000 in stock and no additional paid-in-capital. Loans from shareholders, which cannot be included in an alien's qualifying investment pursuant to the definition of "invest" quoted above, totaled \$190,828 by the end of 2001. Thus, even these loans are well below the \$500,000 allegedly invested. Finally, as stated above, as of the end of 2001, after the petitioner's alleged investment, Maen Bibars is still listed as the 100 percent owner of Bright International on the corporate tax returns.

In light of the above, the record does not establish that anyone has ever invested \$500,000 into [REDACTED]. The record also does not establish that the petitioner has ever invested any funds into the corporation.

MINIMUM INVESTMENT AMOUNT

Beyond the decision of the director,¹ the petitioner indicates that the petition is based on an investment in a business located in a targeted employment area for which the required amount of capital invested has been adjusted downward to \$500,000.

8 C.F.R. § 204.6(e) states, in pertinent part, that:

Targeted employment area means an area which, at the time of investment, is a rural area or an area which has experienced unemployment of at least 150 percent of the national average rate.

8 C.F.R. § 204.6(j)(6) states that:

If applicable, to show that the new commercial enterprise has created or will create employment in a targeted employment area, the petition must be accompanied by:

* * *

(ii) In the case of a high unemployment area:

(A) Evidence that the metropolitan statistical area, the specific county within a metropolitan statistical area, or the county in which a city or town with a population of 20,000 or more is located, in which the new commercial enterprise is principally doing business has experienced an average unemployment rate of 150 percent of the national average rate; or

(B) A letter from an authorized body of the government of the state in which the new commercial enterprise is located which certifies that the geographic or political subdivision of the metropolitan statistical area or of the city or town with a population of 20,000 or more in which the enterprise is principally doing business has been designated a high unemployment area. The letter must meet the requirements of 8 C.F.R. § 204.6(i).

A petitioner must demonstrate that the location of the business was in a targeted employment area at the time of filing. *Matter of Soffici*, 22 I&N Dec. 158, 159-160 (Comm. 1998), *cited with approval in Spencer Enterprises, Inc. v. United States*, CIV-F-99-6117, 23-24, (E.D. Calif. 2001).

¹ An EB-5 application that fails to comply with the specific technical requirements of the law may be denied even if the Service Center does not identify all grounds for denial. *Spencer Enterprises, Inc. v. United States*, CIV-F-99-6117 29, (E.D. Calif. 2001).

Initially, the petitioner submitted a letter from the Arizona Department of Commerce asserting that Pinal County, the county in which [REDACTED] apparently operates, has been designated by the state as an "enterprise zone." The petitioner also submitted a press release posted on an Arizona State website indicating that state enterprise zones are designated based on "unemployment or poverty levels for area residents." Poverty rates are irrelevant in determining whether an area is a targeted employment area for purposes of the classification sought by the petitioner. As quoted above, 8 C.F.R. § 204.6(e) defines a targeted employment area as having an unemployment rate of at least 150 percent of the national average. It is not even known whether the unemployment considerations for designation as a state enterprise zone requires an unemployment rate of 150 percent of the national average. Moreover, the State of Arizona designated the Department of Economic Security, not the Department of Commerce, to designate targeted employment areas. Thus, the letter from the Department of Commerce does not comply with 8 C.F.R. § 204.6(j)(6)(ii)(B) quoted above. In addition, a designation by the Department of Commerce that the county is an enterprise zone is meaningless for purposes of determining whether the county is a targeted employment area as defined in 8 C.F.R. § 204.6(e) quoted above. The record contains no evidence of Pinal County's unemployment rate in 2001.

In light of the above, the minimum investment amount in this case is \$1,000,000. The petitioner does not claim to have invested that amount.

EMPLOYMENT CREATION

8 C.F.R. § 204.6(j)(4)(i) states:

To show that a new commercial enterprise will create not fewer than ten (10) full-time positions for qualifying employees, the petition must be accompanied by:

(A) Documentation consisting of photocopies of relevant tax records, Form I-9, or other similar documents for ten (10) qualifying employees, if such employees have already been hired following the establishment of the new commercial enterprise; or

(B) A copy of a comprehensive business plan showing that, due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten (10) qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired.

8 C.F.R. § 204.6(e) states, in pertinent part:

Qualifying employee means a United States citizen, a lawfully admitted permanent resident, or other immigrant lawfully authorized to be employed in the United States including, but not limited to, a conditional resident, a temporary resident, an asylee, a refugee, or an alien remaining in the United States under

suspension of deportation. This definition does not include the alien entrepreneur, the alien entrepreneur's spouse, sons, or daughters, or any nonimmigrant alien.

Section 203(b)(5)(D) of the Act, as amended, now provides:

Full-Time Employment Defined – In this paragraph, the term 'full-time employment' means employment in a position that requires at least 35 hours of service per week at any time, regardless of who fills the position.

Full-time employment means continuous, permanent employment. *See Spencer Enterprises, Inc. v. United States*, CIV-F-99-6117, 19 (E.D. Calif. 2001)(finding this construction not to be an abuse of discretion).

While not directly discussed by the director, the petitioner has also failed to demonstrate that his investment will create the required number of jobs. The petitioner has not demonstrated how many workers Bright International employed at the time of the petitioner's alleged investment. Specifically, while the petitioner submitted the corporation's 2000 Forms W-2, the petitioner asserts that there was significant turnover during the year. Thus, the forms do not establish how many employees worked at one time. While the petitioner submitted an employee list, it is not supported by quarterly wage and withholding reports or Forms I-9.

The petitioner submitted a business plan projecting at least 10 new jobs due to the construction of a \$3,500,000 facility. As stated above, the petitioner has submitted insufficient evidence reflecting that he has contributed any of the funds used to finance this alleged new facility. Moreover, the record does not contain the contract for the construction of the facility or any other evidence of its existence. The "past performance" balance sheets submitted initially as part of the business plan do not reflect how the remaining \$3,000,000 in construction costs will be financed as they reflect only \$274,000 in long term liabilities in 2001 (\$0 on the 2001 tax return submitted on appeal) and none in 2002. According to these balance sheets, the short-term notes were only \$40,000 in 2001 (\$700,325 on the 2001 tax return) and \$250,000 in 2002. The claim that the retained earnings increased from negative \$993,470 in 2001 to \$3,869,399 as of July 15 2002 (the date of the business plan) is unsupported by the record. As this increase is not consistent with past performance, such a claim must be supported with credible evidence. The record contains no evidence of a \$3,000,000 loan, additional capital, or net gain. Given the inconsistencies in the record discussed above, more definitive evidence of the construction of this facility and its financing is required. In light of the above, the claim that the petitioner's alleged investment will create any new jobs is not supported by the record.

For all of the reasons set forth above, considered in sum and as alternative grounds for denial, this petition cannot be approved.

As stated above, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Thus, any motion attempting to address the

above inconsistencies must be supported with credible evidence. Any tax returns submitted on motion must be certified as filed by the Internal Revenue Service.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.